

UNIVERSITY OF COLORADO; BOULDER

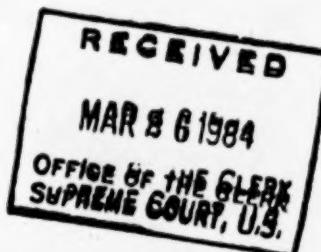
School of Law



March 20, 1984

Miss June M. Hoffman
Assistant Clerk
Supreme Court of the United States
Washington, DC 20543

Re: Reed v. Ross, No. 83-218



Dear Miss Hoffman:

In my brief on behalf of respondent in the above case, I wrote, at page 2: "The North Carolina Supreme Court has, however, reviewed the correctness of instructions despite the failure of the defendant properly to make that issue the basis of an assignment of error in the record on appeal . . . Indeed, it did exactly that on Ross' appeal"

At page 41, I further wrote: "North Carolina law provides flexibility in the determination whether to impose a forfeiture for a procedural default."

At oral argument on March 27, I would like to advise the Court of authority in support of those statements in addition to that cited in the brief. By this letter I would like to provide the Court that authority in writing and to advise counsel of it in advance. I hope that this is acceptable. I do not know whether the Court would permit these to be printed pursuant to Rule 41(5).

Rule 2 of the North Carolina Rules of Appellate Procedure, adopted June 13, 1975, provides as follows:

"To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions."

The Drafting Committee Note to that Rule explains:

"This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules The power does not depend

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upon its express reservation by the Court in the body of the Rules."

The North Carolina Supreme Court and the North Carolina Court of Appeals have frequently in civil and criminal cases agreed to reach the merits of an issue despite the failure of a party properly to present it on appeal, as the North Carolina Supreme Court did in Ross' case. E.g.,

State v. Booker, 306 N.C. 302, 293 S.E.2d 78, 84 (1982);

State v. Poplin, 304 N.C. 185, 282 S.E.2d 420, 421 (1981);

State v. Rinck, 303 N.C. 551, 280 S.E.2d 912, 918 (1981);

State v. Cohen, 301 N.C. 220, 270 S.E.2d 416, 418 (1980);

Stillwell Enterprises v. Interstate Equipment, 300 N.C. 286, 266 S.E.2d 812, 814 (1980);

State v. Williams, 300 N.C. 190, 265 S.E.2d 215, 216 (1980);

State v. Benton, 299 N.C. 16, 260 S.E.2d 917, 921 (1980);

State v. Adams, 298 N.C. 802, 260 S.E.2d 431, 432 (1979);

State v. Samuels, 298 N.C. 783, 260 S.E.2d 427, 430 (1979);

Harrington Mfg. Co. v. Cogan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423, 424 (1981);

State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751, 754 (1981);

Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27, 30 (1981);

State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738, 740-741 (1981);

Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880, 882 (1981);

Peoples Serv. Drug Stores v. Mayfair, N.V., 50 N.C. App. 442, 274 S.E.2d 365, 368 (1981);

Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731, 735 (1981);

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State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262, 264 (1980);

Oroweat Emp. Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211, 214 (1980);

State ex rel. Utilities Commission v. Springdale Estates, 46 N.C. App. 488, 265 S.E.2d 647, 649 (1980);

Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385, 386 (1980);

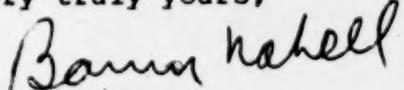
Econo-Travel Motor Hotel v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661, 663 (1979);

Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, 791 (1979);

Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69, 69 (1978).

Thank you very much.

Very truly yours,



Barry Nakell
Visiting Professor of Law

BN:ag

cc: Mr. Richard N. League
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Mr. Rex E. Lee
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Department of Justice
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